No. CV-21-517

IN THE SUPREME COURT OF ARKANSAS

LESLIE RUTLEDGE, individually and
as Attorney General of the State of Arkansas,
Defendant-Appellant,

v.

PRATT REMMEL, GALE STEWART, GLEN HOOKS, ROBERT B. LEFLAR, ELAINE DUMAS, MICHAEL B. DOUGAN, HARVEY JOE SANNER, and JACKIE SIMPSON,
Plaintiffs-Appellees.

On Appeal from the Pulaski County Circuit Court, Sixteenth Division
No. 60CV-21-341 (Hon. Morgan E. Welch)

Appellant's Reply Brief

LESLIE RUTLEDGE
Arkansas Attorney General
MICHAEL A. CANTRELL (2012287)
Assistant Solicitor General
MICHAEL A. MOSLEY (2002099)
Assistant Attorney General
KESIA MORRISON (2015244)
Assistant Attorney General

OFFICE OF THE ARKANSAS
ATTORNEY GENERAL
323 Center Street, Suite 200
Little Rock, Arkansas 72201
(501) 682-2007
Michael.Cantrell@ArkansasAG.gov

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes and Session Laws

ARGUMENT

The purely political nature of Plaintiffs' claims is manifest both from what their brief says and from what it doesn't say. After an error-riddled recitation of allegations from the amended complaint, Plaintiffs address their lawsuit's campaign-related character. They don't deny it—indeed, they've repeatedly emphasized its campaign-related nature, *see, e.g.*, (RP9-10, 70, 86-88, 177)—but instead double down on their overwrought rhetoric concerning the Attorney General's substantive decision-making. Plaintiffs' brief continues and concludes with claims that are contrary to authority, misrepresent this Court's decisions, and entirely miss the point.

But most telling is that Plaintiffs do not even try to go toe-to-toe with the Attorney General's briefing. As noted below, Plaintiffs' brief utterly fails to address the Attorney General's arguments on every issue presented. As a result, any response on those points "is deemed waived." *Bost v. Masters*, 235 Ark. 393, 399B, 361 S.W.2d 272, 277 (1962) (suppl. op.); *see Durham v. Marberry*, 356 Ark. 481, 485, 156 S.W.3d 242, 244 (2004) (declining to address appellees' argument not briefed).

Plaintiffs concur that a de novo standard of review is proper on this appeal. (Pl.'s Brief at 14).[1] For the reasons set forth in the Attorney General's brief and herein, this Court should reverse the circuit court with instructions to dismiss the amended complaint with prejudice.

I. The Attorney General retains broad common-law and statutory authority to maintain the interests of the State.

The Attorney General's brief sets forth the office's broad authority to maintain the public interest under the common law and by statute. (Def.'s Brief at 21-28). But Plaintiffs do not brief the nature of the Attorney General's common-law authority other than to claim that it doesn't exist. They ignore this Court's recognition that "[i]n the exercise of his common-law powers, an attorney general may not only control and manage all litigation in behalf of the state, but he may also intervene in all suits or proceedings which are of concern to the general public." *State ex rel. Williams v. Karston*, 208 Ark. 703, 708, 187 S.W.2d 327, 329 (1945). And they wrongly assert that by enacting Arkansas Code Annotated sections 25-16-702 and -703, the General Assembly extinguished any such authority. Nothing could be farther from the truth.

[1] Plaintiffs-Appellees' brief is referred to herein as "Plaintiffs' Brief" and cited as "Pl.'s Brief." Defendant-Appellant's principal brief is referred to as "the Attorney General's brief" and cited as "Def.'s Brief."

Without simply repeating the argument of the Attorney General's brief (*see* Def.'s Brief at 21-26 (setting forth the Attorney General's broad common-law authority and explaining how Plaintiffs misread section 25-16-703)), suffice it to say that Plaintiffs never acknowledge—indeed, never cite—section 25-16-703(b), which provides that "[n]othing in this section shall relieve the Attorney General of discharging any and all duties required of him or her under the common law." Plaintiffs also never try to harmonize their allegations with the General Assembly's "plac[ing] on the Attorney General . . . 'all duties now required of him under the common law.'" *Karston*, 208 Ark. at 707, 187 S.W.2d at 328 (citing Pope's Digest, sec. 5582 (predecessor to Ark. Code Ann. 25-16-703(b))).

Plaintiffs wrongly assert that in *Parker v. Murry*, 221 Ark. 554, 254 S.W.2d 468 (1953), this Court "rejected the Attorney General's claim to a right under common law" to "intervene in litigation without the express request and approval of the Governor, the director of a state agency, or the General Assembly." (Pl.'s Brief at 29). But neither *Parker* nor any other case says any such thing. *Parker* holds that the Attorney General may "intervene in a suit" to defend a state official or entity pursuant to the Attorney General's *section 25-16-702(a) authority* "when and only when" the official or entity "needs his services and so certifies this need to the Attorney General." *Parker*, 221 Ark. at 561, 254 S.W.2d at 471 (employing section 25-16-702(a)'s language). The case plainly concerns the contours of the Attorney

General's *statutory* power set forth in that particular section. *See id.* at 561, 254 S.W.2d at 471 ("such was the intent of *the Legislature*." (emphasis added)). It did not implicate the Attorney General's common-law authority to maintain the interests of the State. *See id.* at 561, 254 S.W.2d at 471-72.

By enacting section 25-16-702(a) in 1933, the General Assembly did not limit the Attorney General's common-law authority—to say nothing of limiting the office's authority to participate in amicus briefs or to perform any other action at issue in this litigation. Rather, as the title of the Act creating that section explains, it was simply "AN ACT to Curtail the State's Legal Expenses and Regulate and Restrict the Employment of Special Counsel." 1933 Ark. Act 14, 49th General Assembly, Reg. Sess. (February 6, 1933). Far from limiting the Attorney General's common-law authority, this Court's precedents continue to recognize that authority. *See, e.g.*, *Masterson v. State ex rel. Bryant*, 329 Ark. 443, 447, 949 S.W.2d 63, 65 (1997) (quoting *Karston*, 208 Ark. at 711, 187 S.W.2d at 331). This is in addition to the office's other express statutory powers, which include, for example, the authority to "maintain and defend the interests of the state in matters before the United States Supreme Court and all other federal courts." Ark. Code Ann. 25-16-703(a).

"Clearly then the Attorney General could bring an action . . . if authority to do so were granted by statute, or under his common-law powers unless such authority was *specifically* taken from him by the Legislature." *Morley v. Berg*, 216 Ark. 562, 566, 226 S.W.2d 559, 561 (1950) (emphasis added); (*see* Def.'s Brief at 26 (limitations on common-law powers must be express and are strictly construed)). Contrary to Plaintiffs' contentions, therefore, the Attorney General retains broad common-law and statutory authority to maintain the interests of the State.

II. Plaintiffs' lawsuit presents a non-justiciable political question or calls for an advisory opinion.

The Attorney General's brief argues that Plaintiffs' suit has several features that characterize the cases the U.S. Supreme Court has described as posing non-justiciable political questions. (Def.'s Brief at 28-33). Plaintiffs do not address those arguments.

Instead, Plaintiffs relegate their discussion of the threshold political-question issue to the end of their brief, where they try to muddy the waters, falsely claiming that they are not asking the Court to "interfere with the executive discretion or decisions of a member of the Executive Branch." (Pl.'s Brief at 35). "Instead," they assert, "Plaintiffs are asking the Court to determine who, in the Executive Branch,

has the authority to make executive decisions to commence or intervene in litigation regarding the 'interests of the state,' and to prevent the Attorney General from exceeding the constitutional and statutory prerogatives of her office." (*Id.*).

Plaintiffs have conceded—and their brief does not deny—that their whole case depends on the claim that the Attorney General has actually exceeded her authority. (*See* Def.'s Br. at 20). If Plaintiffs now really intend to abandon that claim, then they are asking for a mere advisory opinion on abstract questions, and the Court should remand with instructions to dismiss the amended complaint with prejudice.

If, on the other hand, Plaintiffs do *not* intend to abandon their claim that the Attorney General has exceeded her authority, then Plaintiffs must be held to their concession that "the[ir] claims asserted against [the Attorney General]" are "that she exceeded her constitutional, statutory, and common law duties." (Pl.'s Brief at 22); *see* (RP177 (alleging actions "were not in the interest of the State of Arkansas, but in her own political and economic interest.")); *see also* (RP 175, 178-179). Indeed, Plaintiffs' amended complaint urges that "Defendant Rutledge should be determined to be *liable individually*" for her substantive decisions. (RP185 (emphasis added)). It is disingenuous, therefore, for Plaintiffs to claim that they are *not* contesting "the executive discretion or decisions of a member of the Executive Branch" concerning what constitutes the interests of the State. (Pl.'s Brief at 35).

As explained more fully in the Attorney General's brief, what constitutes the interests of the State is a non-justiciable political question (*see* Def.'s Brief at 28-33) that is committed to the Attorney General's authority by the common law (*see id.* at 21-25), the text and structure of the Arkansas Constitution (*see id.* at 26-28), and the plain language of section 25-16-703(a) ("The Attorney General shall maintain and defend the interests of the state in matters before the United States Supreme Court and all other federal courts."); (*see* Def.'s Brief at 21, 25-26).

Because Plaintiffs present a political question unfit for judicial review, they fail to invoke the subject-matter jurisdiction of the courts. Or, at least, the Court must reject Plaintiffs' suit on separation-of-powers grounds. In either case, this Court should reverse the circuit court with instructions to dismiss the amended complaint with prejudice.

III. The Attorney General is entitled to absolute immunity.

The Attorney General's brief argues that the Court may look to history and the common law for analogies to the Attorney General's entitlement to immunity. (Def.'s Brief at 33-35). Plaintiffs, recognizing that "[t]his is an unusual case" (Pl.'s Brief at 9)—indeed, one where that history is pertinent—do not substantively contest the analogy of the Attorney General's circumstances to other officials who have been afforded immunity for their discretionary acts.

Instead, Plaintiffs' brief urges that absolute immunity applies *only* to acts performed within the scope of the Attorney General's authority. But—knowing they cannot prevail—Plaintiffs simultaneously forfeit their opportunity to brief that very issue. Plaintiffs simply ignore the Attorney General's common-law authority and fail even to acknowledge the existence of section 25-16-703(b), which provides that "[n]othing in this section shall relieve the Attorney General of discharging any and all duties required of him or her under the common law." Plaintiffs' argument boils down to the incorrect claim that because their cramped misreading of sections 25-16-702 and -703(a) does not authorize the Attorney General's actions, those action are not authorized.

Plaintiffs have no serious argument that the Attorney General has acted outside the scope of her authority. As explained in the Attorney General's brief (Def. Brief at 19-27, 33-35) and herein, the Attorney General has acted pursuant her discretionary authority to exercise her independent judgment just like other officials who have been afforded immunity. Therefore, the Attorney General is entitled to absolute immunity, and the Court should reverse the circuit court with instructions to dismiss the amended complaint with prejudice.

IV. The Attorney General is entitled to qualified immunity.

The Attorney General's brief argues that Plaintiffs cannot meet their burden to show the deprivation of any statutory or constitutional right because the funds at

issue in their illegal-exaction claim are not derived from taxation. (*See* Def.'s Brief at 36-38). Plaintiffs do not address those arguments. In particular, Plaintiffs do not address the argument that the funds must implicate the treasury and not merely be traceable to it through a but-for analysis (*see id.* at 37), or the argument that Plaintiffs have not alleged that *any* applicable law has been violated (*see id.* at 37-38). The Attorney General's brief also argues that Plaintiffs cannot succeed at the "clearly established" step of the analysis. (*See id.* at 38-39). Plaintiffs do not address that argument, either.

Instead, Plaintiffs assert, without authority—indeed, contrary to authority—that this Court's immunity cases involving claims under 42 U.S.C. 1983 are somehow not relevant to the Attorney General's immunity to their illegal-exaction claim. That assertion is false. State officials are entitled to statutory immunity from suit for non-malicious acts made within the course and scope of their employment. *Banks v. Jones*, 2019 Ark. 204, at 5, 575 S.W.3d 111, 115 (citing Ark Code. Ann. 19-10-305(a)). The analysis is "guided by the standard used for qualified immunity claims in federal civil rights actions." *Id.*, 575 S.W.3d at 116. Illegal-exaction claims are plainly subject to this immunity defense. *See Dockery v. Morgan*, 2011 Ark. 94, at 19-20, 380 S.W.3d 377, 389.

Despite amending their complaint, Plaintiffs never alleged that the Attorney General has acted maliciously. *See* (RP171-187). The Attorney General has not

violated the statutory or constitutional right of any person. And, in any case, no such right was clearly established at the time of the challenged conduct. Therefore, the Court should reverse the circuit court with instructions to dismiss the amended complaint with prejudice.

V. The Attorney General is entitled to sovereign immunity to any extent that Plaintiffs' claims implicate her official capacity.

The Attorney General's brief argues that Plaintiffs have not alleged official-capacity claims, that they have failed to "successfully plead" the violation of any applicable law, and that Plaintiffs do not come within the Arkansas Constitution's illegal-exaction clause. (*See* Def.'s Brief at 39-43). Plaintiffs' brief does not address the first argument, only indirectly responds to the second, and does not even impliedly respond to the third.

Plaintiffs miss the point by arguing that illegal, unconstitutional, or ultra vires actions can be enjoined. That is because even in a lawsuit "alleging an illegal, unconstitutional, or ultra vires act, *appellees are not exempt from complying with our fact-pleading requirements*." *Arkansas Dev. Fin. Auth. v. Wiley*, 2020 Ark. 395, at 8, 611 S.W.3d 493 (holding claims barred by sovereign immunity due to plaintiff's failure to fact-plead an exception) (emphasis added). "The complaint must provide sufficient facts which indicate that the State is acting in a manner that entitles [Plaintiffs] to one or more of the sovereign-immunity exceptions." *Arkan-*

sas Dep't of Fin. & Admin. v. Lewis, 2021 Ark. 213, at 4, 633 S.W.3d 767, 770 (citations omitted). "Conclusory statements and bare allegations about a claim entitling a party to a sovereign-immunity exception are insufficient," *id.*, as are "a plaintiff's theories, speculation, or statutory interpretation." *Dockery*, 2011 Ark. 94, 6, 380 S.W.3d 377, 382. Indeed, Plaintiffs must allege genuine *facts*—not insinuations stitched together by overwrought rhetoric and incorrect statements of law—demonstrating that the Attorney General has violated the law. They have not done that.

Therefore, the Attorney General is entitled to sovereign immunity, and the Court should reverse the circuit court with instructions to dismiss the amended complaint with prejudice.

REQUEST FOR RELIEF

For all of the reasons set forth in the Attorney General's brief and herein, the Court should reverse the circuit court's denial of the motion to dismiss with instructions to dismiss the amended complaint with prejudice.

Respectfully submitted,

LESLIE RUTLEDGE
Arkansas Attorney General
MICHAEL A. CANTRELL (2012287)
Assistant Solicitor General
MICHAEL A. MOSLEY (2002099)
Assistant Attorney General
KESIA MORRISON (2015244)
Assistant Attorney General

OFFICE OF THE ARKANSAS
ATTORNEY GENERAL
323 Center Street, Suite 200
Little Rock, Arkansas 72201
(501) 682-2007
Michael.Cantrell@ArkansasAG.gov

Counsel for Appellant

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Administrative Order No. 19 in that all "confidential information" has been excluded from the "case record" by (1) eliminating all unnecessary or irrelevant confidential information; (2) redacting all necessary and relevant confidential information; and (3) filing an unredacted version under seal, as applicable.

This brief complies with Administrative Order No. 21, sec. 9 in that it does not contain hyperlinks to external papers or websites.

Further, this brief conforms to the word-count limitations identified in Rule 4-2(d). The argument and request for relief together contain 2411 words.

The following original paper documents are not in PDF format and are not included in the PDF document(s) file with the Court: None.

/s/ Michael A. Cantrell
Michael A. Cantrell

CERTIFICATE OF SERVICE

I certify that on January 27, 2022, I electronically filed this document with the Clerk of Court using the eFlex electronic-filing system, which will send notification of the filing to any participants.

/s/ Michael A. Cantrell
Michael A. Cantrell